

## JUDGE SOTOMAYOR RESCINDS HER PROMISE NOT TO USE FOREIGN LAW

### Judge Sotomayor Embraced Judges Looking to Foreign Law *Before* She Was Nominated:

- **Judge Sotomayor:** “To suggest to anyone that you can outlaw the use of foreign or international law is a sentiment that’s based on a fundamental misunderstanding, what you would be asking American judges to do is to **close their minds to good ideas. . . . Nothing in the American legal system prevents us from considering the ideas.**”
- **Sotomayor:** “[I]nternational law and foreign law will be very important in the discussion of how we think about the unsettled issues in our own legal system. It is **my hope that judges everywhere will continue to do this** because . . . within the American legal system **we’re commanded to interpret our law in the best way we can, and that means looking to what other, anyone has said to see if it has persuasive value.**”
- **Sotomayor:** “The nature of the criticism [of the use of foreign law by judges] comes from . . . a misunderstanding of the American use of that concept of using foreign law and **that misunderstanding is unfortunately endorsed by some of our own Supreme Court justices.** Both **Justice Scalia and Justice Thomas** have written extensively criticizing the use of foreign and international law in Supreme Court decisions. They have a somewhat valid point. They argue that because there are so many international and foreign laws, so many of them vary, that a judge can look to the law of any country to support his or her own conclusion, because they’ll find somebody to will [sic] who will agree with them. . . . It is a point that is validly taken. But, I **share more the ideas of Justice Ginsburg in thinking, . . . in believing that unless American courts are more open to discussing the ideas raised by foreign cases, and by international cases, that we are going to lose influence in the world.** Justice Ginsburg has explained very recently . . . that **foreign opinions . . . can add to the story of knowledge relevant to the solution of a question, and she’s right.**”

### Judge Sotomayor Backs Away from Her Prior Statements *During* the Hearing:

- **Senator Coburn:** “[W]ill you affirm to this Committee and the American public that, outside of where you are directed to do so through statute or through treaty, refrain from using foreign law in making the decisions that you make that affect this country and the opinions that you write?”
- **Sotomayor:** “**I will not use foreign law to interpret the Constitution or American statutes.** I will use American law, constitutional law to interpret those laws, except in the situations where American law directs a court.”
- **Coburn:** “You have been fairly critical of Justice Scalia’s criticism of the use of foreign law in making decisions.”

- **Sotomayor:** “I have **actually agreed with Justice Scalia and Thomas** on the point that one has to be very cautious even in using foreign law with respect to the things American law permits you to.”
- **Coburn:** “So you stand by it? There is no authority for a Supreme Court justice to utilize foreign law in terms of making decisions based on the Constitution or statutes?”
- **Sotomayor:** “Unless the statute requires you or directs you to look at foreign law ... the answer is no.”

### **Judge Sotomayor Reverts Back to Her Former Position *After* the Hearing in Written Responses to Questions for the Record:**

- **Sotomayor:** “In my view, American courts should not ‘use’ foreign law, in the sense of relying on decisions of foreign courts as binding or controlling precedent, except when American law requires a court to do so. **In some limited circumstances, decisions of foreign courts can be a source of ideas, just as law review articles or treatises can be sources of ideas. Reading the decisions of foreign courts for ideas, however, does not constitute ‘using’ those decisions to decide cases.**”
- **Sotomayor:** “In limited circumstances, **decisions of foreign courts can be a source of ideas informing our understanding of our own constitutional rights.**”
- **Sotomayor:** “As I explained in my speech, I believe that Justices Scalia and Thomas have ‘a somewhat valid point’ on this issue. In particular, their argument that, because ‘there are so many international and foreign laws that a judge can look to a law of any country to support his or her own conclusion, because they’ll find somebody to agree with them’ is ‘validly taken.’ At the same time, I also explained in my speech that, **in my view, this criticism does not support the conclusion that American judges should ignore entirely the decisions of foreign courts. In some limited circumstances, decisions of foreign courts can be a source of ideas ...**”
- **Sotomayor:** “To the extent that the decisions of foreign courts contain ideas that are be [sic] helpful to that task, American courts may wish to consider those ideas.”

### **Judge Sotomayor Refuses to Answer Whether She Would Consider Foreign Law When Interpreting Second Amendment Rights:**

- **Sotomayor:** “Because cases raising Second Amendment questions are currently pending before the Court, I would not comment on how I would decide those cases if I am confirmed.”

### **Judge Sotomayor Is Still Concerned about World Opinion of American Law:**

- **Sotomayor:** “To the extent that American courts categorically refuse to consider the ideas expressed in the decisions of foreign courts, it may be that foreign courts will be less likely to look to American law as a source of ideas.”